

February 1, 2011

**Via Electronic Delivery Service**

Chairman Julius Genachowski  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: Obligation to Pay Tariffed Access Charges; CC Docket 01-92**

Dear Mr. Chairman:

PAETEC Holding Corp. (on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC entities, McLeodUSA Telecommunications Services, L.L.C., and Cavalier entities), Pac-West Telecomm, Inc., U.S. TelePacific Corp., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance (collectively the “undersigned parties”) urge the Commission to reiterate long-standing precedent that carrier customers must adhere to the payment and dispute resolution procedures in federal switched access tariffs and may not engage in self-help.

The undersigned parties are concerned about the extent of non-payment (or independently determined and applied reduction) of switched access charges. Unilateral self-help is usurping the Commission’s role of enforcing and setting federal communications policy and undermining the integrity of the telecommunications marketplace. Customers that utilize feature group or meet point billing trunks (together, “Switched Access Services”) to send calls to, or receive calls from, local exchange carriers are required to pay tariffed switched access charges. The Commission recently made clear that it does “not endorse such withholding of payment.”<sup>1</sup> It should go further in its intercarrier compensation Notice of Proposed Rulemaking<sup>2</sup> (the “NPRM”) to emphasize that none of the questions it asks, or changes it proposes, alter this requirement to pay and dispute a tariffed rate pursuant to the applicable dispute resolution provisions.

The Commission has held that “the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties.”<sup>3</sup> In fact, “[t]he Commission previously has stated that a customer, even a competitor, *is not entitled to the self-help measure of withholding payment for tariffed services* duly performed but should first pay, under protest, the

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<sup>1</sup> *All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom*, File No. EB-10-MD-003, Memorandum Opinion and Order, FCC 11-5, ¶ 13 (rel. January 20, 2011).

<sup>2</sup> Press Release, *FCC Announces Tentative Agenda for February 8th Open Meeting* (January 18, 2011).

<sup>3</sup> *Tel-Central of Jefferson City Missouri, Inc. v. United Telephone Co.*, Memorandum Opinion and Order, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989); *See also, National Communications Association, Inc. v. AT&T Co.*, 2001 WL 99856, \*6 (S.D.N.Y. Feb. 5, 2001) (“The clear line of authority regarding rate disputes is that *the customer may not resort to self-help*; that is, the customer may not merely refuse payment of the disputed rate but must pay the rate and then bring an action to determine the validity of the carrier’s actions.”) (emphasis added); *James M. Carpenter et al. d/b/a Carpenter Radio Company*, Memorandum Opinion and Order, 70 FCC 2d 1756, at ¶ 6 (1979) (“[A] customer has a legal obligation to pay all tariffed rates for telecommunications services . . . until such time as these rates are found unlawful by the Commission or a court of competent jurisdiction.”).

amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.<sup>4</sup> Notwithstanding this directive, many carrier-customers are unilaterally defining new categories of traffic that they allege are exempt from access charges even when sent/received over Switched Access Services, or objecting otherwise to the level of payment due pursuant to lawful tariff for such services. Such carriers may make payments not at switched access rates, but at reciprocal compensation rates, including the lowest reciprocal compensation rate of \$0.0007. These are not good faith access disputes but blatant attempts to re-write the rules and all but eliminate switched access charges before the Commission has considered the issue.

Other carriers have brought this issue to the Commission's attention in recent weeks. On January 18, 2011, the CEOs of Qwest, CenturyLink, Frontier, and Windstream requested that the Commission enforce existing switched access rules.<sup>5</sup> The diverse collection of carriers complaining confirms that non-payment of access charges risks becoming endemic in the industry.

With respect to IP-originated traffic, it is clear that the Enhanced Service Provider ("ESP") exemption applies to "providers" that purchase local service and *not to* traffic.<sup>6</sup> The ESP exemption may permit certain entities to obtain local business connections to the PSTN *in lieu of* using interstate access services,<sup>7</sup> but it was never intended to permit an entity to route and deliver calls without *any* payment of access charges where that entity specifically used Switched Access Services. Indeed, the Commission has held that interexchange carriers ("IXCs") cannot avoid paying interstate switched access charges for their use of Switched Access Services based upon the fact that the IXC is sending

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<sup>4</sup> *Business WATS, Inc. v. AT&T Co.*, Memorandum Opinion and Order, DA 92-1613, 7 FCC Rcd. 7942, at ¶ 2 (Com. Car. Bur. 1992) (emphasis added); *Affinity Network, Inc. v. AT&T Co.*, Memorandum Opinion and Order, DA 92-1601, 7 FCC Rcd. 7885, at ¶ 2 (Com. Car. Bur. 1992) (same); *NOS Communications, Inc. v. AT&T Co.*, Memorandum Opinion and Order, DA 92-1594, 7 FCC Rcd. 7889, at ¶ 2 (Com. Car. Bur. 1992) (same); *Business Choice Network v. AT&T Co.*, Memorandum Opinion and Order, DA 92-1582, 7 FCC Rcd. 7702, at ¶ 2 (Com. Car. Bur. 1992) (same).

<sup>5</sup> Letter dated January 18, 2011 to Chairman Genachowski from the CEOs of Qwest, CenturyLink, Frontier, and Windstream, *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Support*, WC Docket No. 05-337, *IP-Enabled Services*, WC Docket No. 04-36, *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92; *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68.

<sup>6</sup> See *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002) (FCC did not "directly exempt[] ESPs from interstate access charges" but "defined them as 'end users.'"). *Access Charge Reform*, CC Docket Nos. 96-262, 94-1 *et al.*, 12 FCC Rcd. 15982, 16133 ¶¶ 343-345 (1997) (ESPs should remain classified as end users); see also 47 C.F.R. § 69.2(m).

<sup>7</sup> *MTS and WATS Market Structure*, CC Docket No. 78-72, 97 FCC 2d 682, Memorandum Opinion and Order, ¶ 83, 1983 WL 183026 (rel. Aug. 22, 1983); *Inter-carrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order, ¶ 27, 16 FCC Rcd. 9151 (rel. April 27, 2001) ("the ESP exemption . . . affords one class of entities using interstate access -- information service providers -- the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXCs").

traffic either to or from an ESP.<sup>8</sup> Unless and until the Commission changes its rules, customers who are using Switched Access Services, or responsible for sending or receiving traffic over Switched Access Services (including 1+ or “8YY” traffic), must pay and dispute charges pursuant to the applicable tariffs.

Sincerely yours,

*/s/ electronically signed*

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Vice President of Public Policy and  
Regulatory  
PAETEC Holding Corp.

*/s/ electronically signed*

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Nancy Lubamersky  
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<sup>8</sup> See *Northwestern Bell Telephone Co. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986, 5988, ¶ 21 (“End users that purchase interstate services from interexchange carriers [, such as 800 or 976 services,] do not thereby create an access charge exemption for those carriers.”), *vacated as moot*, 7 FCC Rcd. 5644, ¶ 1 (1992); 47 C.F.R. § 69.5(b).

Julius Genachowski, Chairman  
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cc: Commissioner Michael J. Copps  
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Commissioner Mignon L. Clyburn  
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